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Supreme Court of the United States.

OCTOBER TERM 1902.

No. 167.

NASHUA SAVINGS BANK,
PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY (LIMITED,)
RESPONDENT.

BRIEF FOR RESPONDENT.

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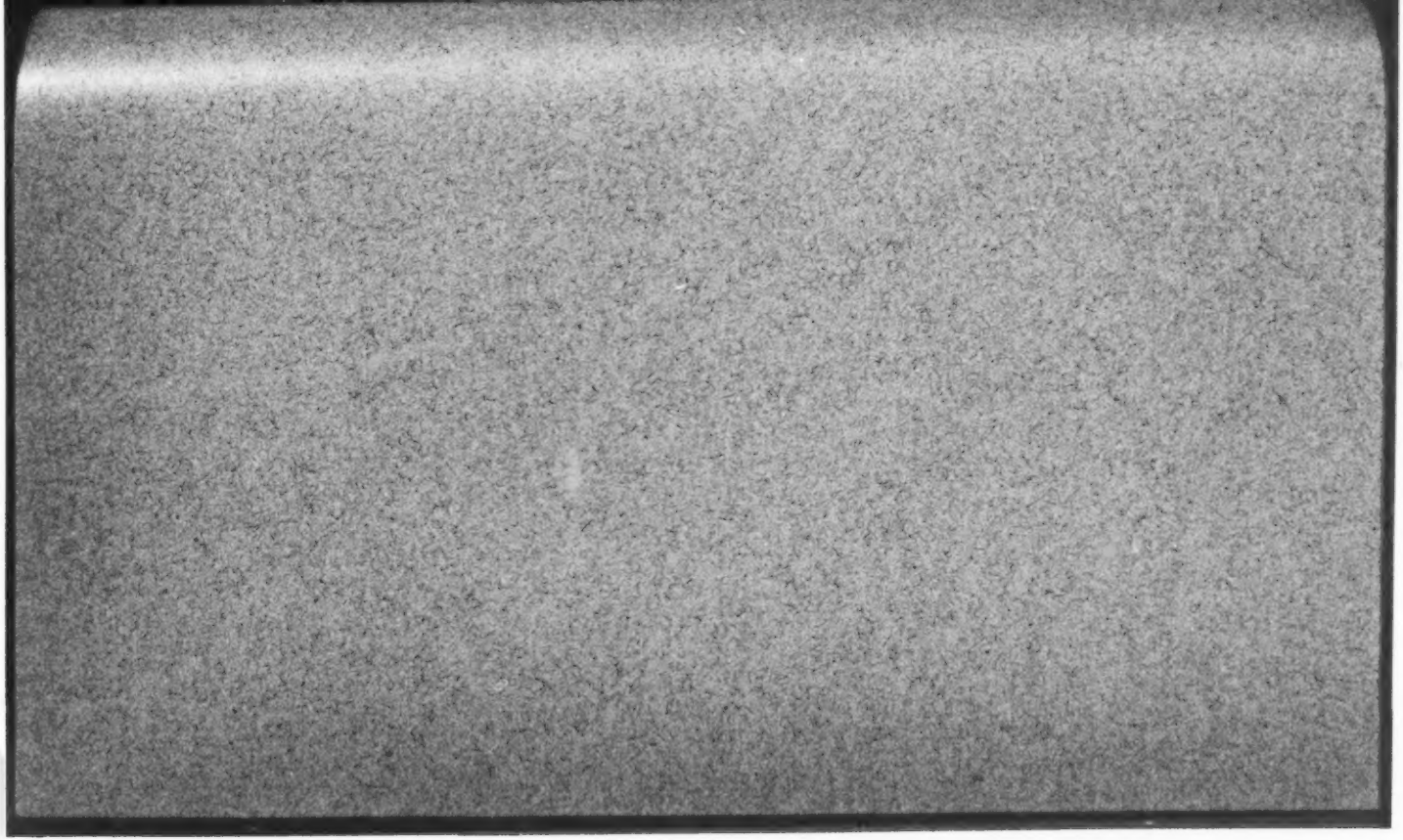

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NASHUA SAVINGS BANK,
Petitioner,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited,
Respondent.

Brief of Respondent.

Statement.

The Anglo-American Land Mortgage and Agency Company, an English corporation brought action against the Nashua Savings Bank to recover two calls made by its directors against its shareholders on account of moneys unpaid on the par value of their stock.

One call was made in 1894 and the other in 1895. The 1894 call was subsequently paid (p. 9). The action proceeded to trial upon the 1895 call (p. 10) before the Honorable William L. Putnam, Circuit Judge, and a Jury. During the progress of the trial the petitioner saved the following exceptions:

1st. To the admission of the answer of Frederick Herbert Ramsden (p. 12) upon the ground that it did not appear that witness had personal knowledge of the facts answered.

Presented here by the 1st assignment of error (p. 46).

2d. To the admission of the Statutes of Great Britain upon the ground that they were "defectively authenticated" (p. 14).

Presented here by the 2d assignment of error (p. 47).

3d. To the admission of Article 140 of the Company's Articles of Association (p. 23) upon the ground that it made an invalid distinction between resident and foreign stockholders.

Presented here by the 3d assignment of error (p. 49).

4th. To the admission of that part of the Company's Register of Members showing its account with the defendant (pp. 23-24) upon the ground that it was not the whole of the share register.

Presented here by the 4th assignment of error (p. 49).

5th. The petitioner requested the Court to instruct the jury that the action could not be maintained until after the respondent had enforced its lien by sale or forfeiture of the petitioner's shares (p. 34).

Presented here by the 31st assignment of error (p. 57).

6th. At the close of "*all*" (p. 26) the evidence, the petitioner moved that the Court direct a verdict for petitioner, which was refused (p. 27) and a verdict was directed for the respondent (p. 44). To this two other exceptions were taken. One to

the direction of a verdict for the respondent and the other to the refusal to direct a verdict for the petitioner (pp. 26 to 34) upon many grounds which are alleged as separate exceptions in the 5th to the 30th assignments of errors (pp. 50 to 57).

The Court in directing the verdict made "observations" (pp. 34 to 44) *i. e.*, he gave an opinion upon certain of the points of law argued by counsel as applied to all the evidences before him.

Petitioner did not ask to go the jury upon any question of fact, neither did the petitioner move for a new trial, but rested its bill of exceptions upon the requests for rulings and exceptions to admission of evidence.

I.

Ramsden's testimony as to non-payment of calls.

[*First Exception, p. 12.*]

As the respondent, to make a *prima facie* case, was not required to prove non-payment of calls, the testimony was immaterial and if that objection had been made the Court could properly have excluded it.

The witness had testified that he was Secretary of the respondent. The Articles of Association (p. 20, §107) prescribe that the Secretary shall "have charge of the books and accounts of the Company, conduct the correspondence on its behalf, etc." *Prima facie*, he had knowledge of the fact. He was the officer, who above all others, would have knowledge of the facts asked.

There was no claim that the call had been paid. Neither did the petitioner's brief statement of defense (pp. 6-7) plead or present the issue of payment.

II.

The authentication of the statutes of Great Britain.

[*Second Exception, p. 14.*]

Foreign statutory laws may be proved:

> (1) by a duly certified copy; (2) by a sworn, compared, written copy, or (3) by a printed copy produced by a licensed practicing attorney of the foreign country authenticated by his oath as having been officially printed and receivable in evidence in that country without further proof.

In this case the third mode of proof was followed. The petitioner objected because statutes were not authenticated according to the first or second methods. U. S. R. S., §721 by providing that the State laws shall be "rules of decision" makes the New Hampshire law of evidence that of the U. S Circuit Court when sitting in that district.

> McNeil vs. Holbrook, 12 Peters, 84 89.
> Conn. Mut. Life Ins. Co. vs. Union Trust Co., 112 U. S., 250-255.

In New Hampshire the rule is still more liberal than that followed in this case.

In Hall vs. Costello (48 N. H., 176) a New Hampshire attorney went to Canada investigated the law, came home and was allowed to testify orally as to what he found to be the Canadian statute law. If respondent had sent a New Hampshire lawyer to England who, after examining the English statutes, had returned and testified, the evidence would have been admissible in a U. S. Court sitting in New Hampshire. We did much better. We produced an English attorney

of 30 years' experience who was "intimately acquainted with English Company or corporation laws," who produced before the Court copies of the statutes printed by the English Government and used as such in the Courts of that country. We submit that it was the best and most practical mode of proving the foreign law.

See also Kennard vs. Kennard, 63 N. H., 303.
State vs. Davis, 69 N. H., 350.
Barrows vs. Downs & Co., 9 R. I., 446.

In the Pawashick, 19 Fed. Cases (#10851) (2 Low., 142). Judge Lowell held that books of "acknowledged and ascertained authority" were competent proof of English law and that "an oath is not necessary in all cases." He asks; "whether the idle, unnecessary and obsolete mode of verification should be insisted upon?"

In Jones vs. Moffit, 5 S. & R., 523, a copy of the Irish statutes sworn to by a barrister as having been received from the King's printer, was held competent.

In Lacon vs. Higgins, 3 Stark, 178, Abbott, C. J., admitted a copy of the French Code produced, by the French Consul, who swore that the copy produced, was used and acted upon by him. The copy purported to be printed by the Royal French printers, where the French laws were printed.

In Merrifield vs. Robbins, 8 Gray, 150, the statutes of Vermont having printed on the title page "By Authority" was held to purport publication by the Government of Vermont and competent.

Counsel does not argue, and it can not be seriously doubted that Ramsden has shown the statutes produced to be the officially printed statutes of England. The statutes produced were verified by the oath of the witness—it was a sworn copy. The

evidence carried on is face, verity and certainty.

There is no reason for a more strict rule. Authentication is a question for the Court. The English law is an open book to judges and lawyers. Our libraries are filled with English textbooks, reports and statutes. The Courts are continually citing them in their opinions. When a judge will take a book from his library shelf, cite it as the law of England and follow it as an authority, why should an attorney do more than present the same book and swear to it as the officially printed laws.

See Church vs. Hubbard, 2 Cranch, 238.
Ennis vs. Smith, 14 How., 426.
Pacific Gas Co. vs. Wheelock, 80 N. Y. 278.
Dundee Mortgage, Trust & Investment Co. vs. Cooper, 26 Fed. Rep., 665.

III.

Does §140 of the articles of association create an unlawful distinction?

[*Third Exception, p. 23.*]

This section provides that if a non-resident stockholder shall "neglect to give his address" the office of the company shall be deemed his address (See p. 22, par. 139).

This is a very reasonable requirement. No wrong is done. Its only application to this case was that the evidence *not included in the record* showed that the petitioner had neglected to give its address and that the notice of call was posted in the office of the company. The evidence however, went further and showed that a notice of call was mailed to and received by the petitioner (p. 36). So, even if this paragraph was invalid, the petitioner

had due notice and actual knowledge of the call. By becoming a stockholder, the petitioner subjected himself to the laws of England governing the respondent Company and all reasonable rules of the Company.

Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 527.

Hudson River Pulp and Paper Co. vs. H. H. Warner, 99 Fed. Rep., 187.

Mandel vs. Swan Land & Cattle Co., 154 Ill. 177. s. c. 27 L. R. A., 313.

IV.

The admission in evidence of the defendant's stock account.

[*Fourth Exception, pp. 23-24.*]

The petitioner's objection was sufficiently answered by the Trial Judge (p. 24). The record expressly states that "no objection is made as to the same not being a copy * * * of defendant's account" (p. 23).

The rule is too familiar to need argument or authority that a litigant has the right to introduce competent evidence without regard as to whether it is all the evidence upon the subject. That the evidence produced does not cover the whole issue may raise the question of sufficiency, but it does not affect its competency.

V.

A sale or forfeiture of the petitioner's shares was not a condition precedent to the responde nt's right to recover calls (Fifth Exception, p. 34).

Measuring the petitioner's liability by the English statutes and the Company's Articles of Association framed thereunder, a forfeiture of the petitioner's shares would not relieve it from liability for the calls (p. 25, §19).

Mandel vs. Swan Land Co. (154 Ill., 177), is in point. The Court there held that notwithstanding forfeiture, a stockholder in an English corporation would be held liable for calls by the Courts in this country.

Forfeiture puts an end to the relation of corporation and stockholder and in many jurisdictions might bar the right to recover for unpaid calls. (7 Thomp. Corp., §8680). The right of forfeiture and the right of action against the shareholder for unpaid calls is usually expressed as a cumulative remedy (Thomp. Corp., §8679). Neither can petitioner question the advisability or necessity of the call.

The Articles of Association provide (p. 20, par. 9) that the directors may "make such calls as they think fit, etc." and the statutes (p. 15, par. 16) enact that the shareholder shall be bound according to the Articles of Association, and that "all moneys payable by any member to the Company in pursuance of the conditions and regulations shall be deemed a debt due from such member to the Company."

This power delegated to the directors cannot be questioned or denied by the Courts except for fraud or oppression.

In the absence of fraud, a stockholder can not question the wisdom or necessity of a call.

Oglesby vs. Attrill, 105 U. S., 605-610.

A stockholder cannot question the necessity or advisability of a call (Cook on Stockholders, §111-113), and a call made by directors is conclusive evidence of its necessity, and binds the stockholder without notice.

Great Western Telegraph Co. vs. Purdy, 162 U. S., 339.

Bailey vs. Birkenhead 12 Beav., 443.

Angio American &c. Co. vs. Dyer, —Mass.—s. c. 64 N. E. Rep. 416, 2 Thomp. Corp., §1710.

VI.

Errors predicated on the direction of a verdict.

[*Sixth Exception, pp. 26-44.*]

Assignments 5th to 30th are but different reasons or grounds for the argument that the Court erred in directing a verdict for the respondent (p. 44) and in refusing to direct a verdict for the petitioner (p. 26).

Whether the Court erred in directing a verdict requires a consideration of the evidence as a whole. This question is not before the Court as all of the evidence was not included in the bill of exceptions nor does it purport to contain all of the evidence.

> Texas & Pacific R. R. vs. Coxe, 145 U. S., 593-606.
>
> Hansen vs. Boyd, 161 U. S., 397.
>
> City of Providence vs. Babcock, 70 U. S., 240-244.
>
> U. S. Mutual Accident Assn. vs. Robinson (C. C. A. 8th Circuit), 74 Fed. Rep., 10.

Every presumption is in favor of the correctness of the decision of the Trial Court and in order to review rulings *based upon all the evidence*, there must be a statement or certificate that all the evidence is included in the bill of exceptions.

> U. S. vs. Patrick (C. C. A., 8th Circuit) 73 Fed. Rep., 800-806.

The bill of exceptions affirmatively shows that it does not contain all the evidence. The opinion of the Trial Judge was made a part of the bill of exceptions (p. 34). And can be looked to in

determining this question. For illustration: none of the evidence as to the *time*, *amount* or *manner* of making the call or of giving notice thereof is included, yet the opinion shows that there was such evidence. In his opinion the Trial Judge said (p. 35):

> "Then there is no doubt that the call for "this assessment has been properly proven. "The only possible question that could have "arisen was whether or not certain persons "were directors of the corporation at the "time of the call. As to that, no issue has "been made."

Again on page 36 he said:

> "Then as to notice of the call. It is plain "from the testimony that the notice was "posted, etc. It is plain from the testimony "of Ramsden, and of the Treasurer of the "defendant corporation that the notice was "mailed to the defendant corporation and "received by it."

As the petitioner has left out nearly all of the evidence and has made the opinion of the Trial Judge a part of his bill of exceptations (see p. 34) he has adopted the statements of the Trial Court as to the sufficiency of the evidence.

> Pennsylvania Co. vs. Swan, 37, Ill. App., at p. 85.

By making the opinion a part of the bill of exceptions the petitioner has bound itself by every statement and conclusion of fact therein. Even the authorities cited in the opinion must be presumed to have been *applicable* to the facts before the Trial Court. In other words, this Court will presume that the authorities cited were applicable to the facts and that the Trial Court correctly stated the *law of this case*. Hence the

respondent's right to recover is plain. By moving that a verdict be directed petitioner admitted the truth of respondent's testimony and every conclusion to be fairly drawn therefrom.

Pleasants vs. Fant, 22 Wall., 116.

Another reason why the direction of a verdict cannot be reviewed is that as the petitioner moved for a direction in its favor and the respondent at the same time moved for a direction in its favor, and as neither party asked to go to the jury upon any question, all questions of fact were left to the Court with the same effect as though the case had been tried by the Court without a jury. The direction of a verdict was a general finding for the respondent which cannot be reviewed here. The motions clothed the Trial Court with the functions of a jury.

Thompson vs. Simpson, 128 N. Y., 270.
Westervelt vs. Phleps, 171 N. Y., 212.
See Signa Iron Co. vs. Greene, 88 Fed. Rep., 207.

Again, as no motion for a new trial was made the sufficiency of the evidence can not be reviewed on a writ of error.

City vs. Babcock, 3 Wall., 240.
See also Mulhall vs. Keenan, 18 Wall., 342.

The petitioner's promise to pay. In the Court below, petitioner strongly insisted that there was no promise, express or implied, to pay calls.

Respondent insisted then, as we do here, that as the record does not contain all the evidence, the question of whether there was an express promise or a statutory liability amounting to an implied promise, can not be considered.

Still, upon the record, fragmentary as it is, a promise is shown.

The share certificate produced by petitioner (p. 22), contained the provision "subject to the Articles of Association and the rules and regulations of the Company. and that up to this day there has been paid in respect to each of such shares, the sum of One pound.

The Articles of Association (p. 20, par. 9) empower the directors to make calls upon the members for the unpaid moneys due upon their shares.

The statutes of Great Britain under which this Company was organized provided (p. 15. par. 16) that the Articles of Association shall bind the members the same as though subscribed by them and that there was therein a covenant upon the part of the shareholder to conform to the regulations contained in the Articles and "all moneys payable by any member to the Company in pursuance to the conditions and regulations should be deemed a debt due from such member to the Company."

The accepting and holding of the shares by petitioner upon these conditions created an implied if not an express promise to pay the balance when called.

The record contained this statement (p. 22):

> "No promise, express or implied, to pay such "assessments was proven other than that "arising from the acceptance and retention of "the certificate of stock by defendant a "from the Articles of Association and rules "and regulations referred to in said Certifi- "cate of stock and the statute of Great "Britain."

This statement does not show that the record contains all the proofs of a promise. In fact it does not refer to any of these facts as being in the

record. While there was evidence upon this question not included in the record, we submit that enough evidence is included to show that the defendant impliedly, if not expressly, promised to pay calls.

The Trial Court held that the evidence *before him* was sufficent (p. 35).

In Tucker vs. Haughton, 63 Mass., 350-354, the Court said:

> "No particular form of words is necessary "to constitute a promise. If the papers show "that the writer has taken upon himself the "duty of paying, it amounts to a promise."

In Buffalo & N. Y. R. R. Co. vs. Dudley (14 N. Y.), Judge Seldon, on page 351 said:

> "On the contrary, as I understand the dis- "tinction between express and implied prom- "ises, that existing in this case belongs to the "former class. An express promise is one "which is expressed in words. No particular "form of words is essential to such a prom- "ise; but if the language used, when fairly "interpreted, imports an undertaking to "pay, this, I apprehend, constitutes "an express promise. The letters 'I. "O. U.' which have been held to "amount to a promissory note, constitute an "express promise no less than if the words "'I promise to pay' had been used. An im- "plied promise, on the other hand, is one "which is not deduced from the language of "the party, but which the law raises upon "principles of equity and justice, in view of "some consideration received. In this case, "a promise to pay is necessarily embraced in "the agreement to take stock, subject to lia- "bilities of the charter. As there was no way "in which the defendant could take stock "agreeably to the charter without paying for "it, an agreement to take, of course, included

"a promise to pay, and this, I apprehend, "must be considered an express promise."

In Howarth vs. Lombard (175 Mass.) p. 574, the Court said:

"The undertaking is as if one subscribing "for stock expressly agreed to take and hold "it under a previously prepared contract in "writing that all who should become holders "of the stock should pay the amount of their "subscription to the corporation when needed, "etc."

In Webster vs. Upton, 91 U. S., 67, the Court said:

" * * * and if its intent was that "the whole capital might be called in, it is "difficult to see why a subscriber, knowing "that intent and voluntarily becoming a sub-"scriber, does not impliedly engage to pay in "full for shares when payment is required."

In Upton vs. Tribilcock, 91 U. S., 45-48, the Court said:

"The acceptance and holding of a certificate "of shares in a corporation makes the holder "liable to the responsibility of a shareholder. " * * * a promise to take shares of "stock imports a promise to pay for them, "(Palmer vs. Lawrence, 3 Sandf. Sup. Ct., "N. Y., p. 9) the acceptance and holding of a "certificate has the same effect."

Whether the liability of the petitioner be defined as an express promise or as an implied promise, is immaterial.

This very question was before the Supreme Court of Massachusetts, in the case of this respondent vs. Dyer—Mass.—s. c., 64 N. E. Rep., 416.

Proof of respondent's incorporation. While, the record does not present this question, still as the

dissenting opinion in the Court below places stress upon the point, we say: Under the English law the "Memorandum of Association" corresponds to the Charter or Certificate of Incorporation in this country and the "Articles of Association" correspond to and are in this country, called "By-Laws."

The respondent's Memorandum of Association was read in evidence in full (p. 17) as was also the Certificate of Incorporation by the Registrar appended thereto (p. 19). No objection was made to either of these.

The witness Ramsden, also testified without objection:

> "The plaintiff Company was organized or "incorporated on 31st October, 1882." (p. 23)

The opinion of the Trial Judge, which is made a part of the bill of exceptions, was that the respondent's incorporation had been sufficiently proved. He said (p. 35):

> "However, it is not necessary to pass upon "that question because I am sure that the "plaintiff has proved the issue in its evidence "so clearly that I would not be authorized to "submit it to the jury."

Notwithstanding the absence of any exception sufficient to raise this question, the Judge in the dissenting opinion insisted that the evidence did not show that respondent was a going concern. No issue was raised by the pleadings beyond the fact of the respondent's incorporation. In other words, that the petitioner by denying (p. 6) that the "plaintiff corporation was ever duly organized" does not raise any issue as to whether the respondent is a going concern. If the dire and dreadful possibilities suggested in the dissenting opinion (p. 66) be true, the petitioner could easily

have shown it. Petitioner has been a shareholder since 1883 (p. 22) and in the fifteen years before the trial had ample opportunity to discover whether there was anything wrong in the respondent's incorporation, or whether it is an active going corporate institution.

Petitioner would certainly have raised the question in the Trial Court if there was any truth in the suggestions of the dissenting opinion below.

A plaintiff need not in proving his *prima facie* case anticipate matters of affirmative defense.

Presumption of Regularity.

If we understand the dissenting opinion in the Court below, it is that the respondent being an alien corporation, there can be no presumption that its officers have acted in a regular or lawful way; that their acts proved in the same way and to the same extent as would be sufficient to prove the acts of officers of a corporation of one of the United States, was not sufficient in this case. No such question was raised in the Trial Court (pp. 35-40) and while the record contains no substantial part of the evidence upon this subject and the question is academic here still we submit that in the absence of evidence to the contrary, the acts of a foreign corporation are presumed to be valid and authorized by the State of its incorporation, 6 Thomp. Corp , §7883.

The rule of the binding obligation of foreign statutes is of no less force because the Courts placed the enforcement upon grounds of comity.

Comity is not a cloudy rule founded upon the courtesy of the Court. It is the common law of this country which the Courts must enforce. As stated by Chief Justice Taney in Bank of Augusta v. Earle (13 Pet. at page 589 where he approvingly quotes Story, Conflict of Laws, §38):

"It is not the comity of the Courts, but the comity of the nation, which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

A corporation organized under a foreign government stands in this respect upon the same footing as corporations of other states.

The British American Land Co. v. Ames
6 Met , 391.
Story, conflict of Laws, §§5-65.
2 Morawetz Corp., §§ 960-961.

These statutes are that which constitutes the respondent corporation. They are as much a part of the petitioner's contract and of his rights as are the different members of the human body a part of that body and necessary to its completeness. It is these statutes which enabled the many persons associated in the respondent company as stockholders to hold themselves out as a single entity, separate and apart from them as individuals. We cannot take away these corporation statutes and their binding obligation upon the stockholders without destroying the corporation.

Petitioners share certificate expressly bound him to an English contract.

See Milliken v. Pratt, 125 Mass., 374.

The acts of this company in the management of its internal affairs must have that presumption of validity that will be accorded to the acts of individuals or to state it more correctly the burden was upon petitioner to show irregularity or invalidity. This presumption falls within that numerous class of presumptions such as presumption of adult age; presumption of sanity; presumption of good character, etc., etc.

These presumptions are accorded to alien individuals the same as to citizens. Of course, these presumptions would not relieve from proof of corporate existence, of laws authorizing the directors to make calls, of the making of calls in the manner prescribed by the statutes and the rules of the company and the contract that the defendant pay calls, but when these proofs are shown a case is made out. In short, it requires no greater *quantum* of proof to make a case for an English corporation than it would for a corporation of any one of the United States.

This Court in Canadian Southern Ry. vs. Gebhard, 109 U. S., 527, at page 537 said:

> "Whatever disabilities are placed upon the "corporation at home, it retains abroad and "whatever legislative control it is subject to "at home, must be recognized and submitted "to by those who deal with it elsewhere. A "corporation of one country may be excluded "from doing business in another country "(Paul vs. Virginia, 8 Wall., 168), but if ad- "mitted it must in the absence of legisla- "tion equivalent to making it a corporation of "the latter country, be taken, both by the "country and those who deal with it, as a "creature of the law of its own country, and "subject to all the legislative control and di- "rection that may be properly exercised over "it at the place of its creation."

Again on page 539 the Court said:

> "Under the circumstances, the true spirit "of international comity requires that schemes "of this character legalized at home should be "recognized in other countries."

If, as in the Gebhard case, a domestic creditor's debt can be wiped out, by a foreign law, it is much easier to see in the case at bar that the

petitioner is liable to perform his fair and reasonable contract with a foreign corporation.

Sufficiency of the Declaration.

The only place where this question was mooted was when the Court was asked to direct a verdict for petitioner (p. 26) and among the many reasons assigned was that the declaration did not contain averments which it was claimed it should.

The verdict is the conclusion of the Court based upon the *facts* in evidence and as stated in another part of this brief, it can only be reviewed by consideration of *all* the evidence.

It is not claimed that the declaration does not state facts sufficient to constitute a cause of action. The most that can be said is that it should have contained allegations of certain facts in order to make the evidence of those facts admissible. That question can only be raised by an objection to the evidence when offered upon the ground that it was irrelevant and not within the issue joined by the pleadings. No such objection was made.

If it be claimed that there is a variance between the declaration and the proofs we answer: (1) that can only be decided by an examination of all the evidence which is not before the Court and (2) that to save the right of objection upon the ground of variance the party must object to the admission of the evidence when it is offered and if he does not do so it is waived.

Roberts vs. Graham, 6 Wall., 578.
Boston & Albany R. R. Co. vs. O'Reilly 158 U. S., 334.
Graves vs. State, 121 Ind , 359.
Dunstan vs. R. R. Kirkland, 3 Hughes 641 s. c. Fed. Cas., 4181.

If the objection be not taken when the evidence is offered, the Court may instruct the jury upon the whole field of inquiry covered by the evidence.

Boyce vs. California Stage Co., 25 Cal., 460.

If objection had been made to the evidence when offered the Trial Court would have passed upon that question and would properly have allowed an amendment if it had found that there was a variance.

In any event it is not a ground for reversal. U. S. R. S., §954, provides that "no writ" * * * declaration * * * judgment * * * shall be * * * reversed for any defect or want of form, but such Court shall proceed to give judgment according as the right of the cause and matter in law shall appear to it, etc."

As the common-law rules of pleadings prevail in New Hampshire it is submitted that the *debitatus assumpsit* is the proper form of action.

See. 1 Chitty on Pleadings (13 Amer. Ed.) *340 *341 *401 *106.

In 2 Chitty pleadings, * 52, will be found a precedent for the declaration in this case. There is also a precedent of this form of declaration in Davis, Treasurer vs. Williams, Administrator, 3 East., 232.

See also Pullman vs. Upton, 96 U. S., 328.
Mandell vs. Swan Land Co., 154 Ill., 177.

If there had been a mistake in the form of action it was only a ground for *non-suit* which was not asked. It is not a ground for the direction of a verdict.

1 Chitty on Pleadings, 197 *198.

In Dermott vs. Jones, 2 Wall, 1—9, this Court said:

> "While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue upon the contract or *indebitatus assumpsit* and rely upon the common counts. In either case the contract will determine the rights of the parties."

While the question was not properly raised the Trial Court (pp. 41-43) and the Court of Appeals (pp. 62) passed upon the form of the declaration and approved it.

Respectfully submitted,

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